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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

SolarCity Corporation,

Plaintiff,

vs.

Salt River Project Agricultural Improvement and Power District,

Defendant.

No. 2:15-CV-00374-DLR

PLAINTIFF SOLARCITY CORPORATION'S OPPOSITION TO DEFENDANT SALT RIVER AGRICULTURAL IMPROVEMENT AND POWER DISTRICT'S MOTION TO CERTIFY AN INTERLOCUTORY APPEAL UNDER 28 U.S.C. § 1292(b)

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SolarCity opposes Defendant Salt River Project Agricultural Improvement and Power District ("SRP")'s motion to certify the Court's motion to dismiss order for interlocutory review under 28 U.S.C. § 1292(b). Dkt. No. 82 (hereafter "Motion" or "Mot."). SRP argues that three questions justify interlocutory review. In large measure, SRP's arguments for certification involve the same legal issues addressed at greater length in SolarCity' concurrently filed opposition to SRP's motion to stay. Dkt. No. 83 ("MTS"). SolarCity confines this brief to unique legal issues and arguments raised in the certification context, and respectfully refers the Court to its concurrently filed opposition to SRP's motion to stay ("O-MTS") when additional elaboration would be duplicative.

INTRODUCTION

In a tacit admission that its appeal was improperly noticed, SRP asks the Court to certify the motion to dismiss order for appeal. Dkt. No. 77 (hereafter the "MTD Order"). The certification statute is narrow and meant for extraordinary circumstances that do not exist here. SRP cannot meet its requirements for any of the questions on which it moves.

Indeed, appeal on two of those questions—the filed-rate doctrine and A.R.S. § 12-820.01—are *irrelevant* to the litigation that will proceed before final judgment in this Court because they relate to claims for damages, whereas SolarCity pursues only injunctive relief pending an appeal of the MTD Order's holding on antitrust damages. SolarCity's damages argument must await final judgment. So must SRP's appeal.

LEGAL STANDARD

The certification procedure under 28 U.S.C. § 1292(b) is a "narrow exception to the final judgment rule." *Couch v. Telescope Inc.*, 611 F.3d 629, 633 (9th Cir. 2010). It is meant for "exceptional circumstances." *In re Cement Antitrust Litig.*, 673 F.2d 1020, 1026 (9th Cir. 1981), *aff'd sub nom. Arizona v. Ash Grove Cement Co.*, 459 U.S. 1190 (1983).

Each of the statute's three requirements must be satisfied before the Court of Appeals may exercise jurisdiction. *Couch*, 611 F.3d at 633. SRP bears the burden to show that Section 1292(b)'s requirements are met. *Id.* The requirements are: The order addresses a question that (1) "involves a controlling question of law," (2) "as to which

there is substantial ground for difference of opinion," and (3) "an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). Even then, the certification only permits the Court of Appeals the *discretion* to take the appeal—a rare occurrence. *See Ahrenholz v. Board of Trustees of the University of Illinois*, 219 F.3d 674, 675 (7th Cir. 2000) (*per curiam* for panel of Posner, Easterbrook, and Wood, JJ.) (rare occurrence); 28 U.S.C. § 1292(b) (appellate discretion).

Notably absent from Section 1292(b) are considerations extrinsic to the litigation. Policy issues such as "comity" with the state do not alter or lessen the statutory requirements. *Couch*, 611 F.3d at 634. The analysis remains "focused on the statutory requirements, not policy considerations which may or may not be furthered by certification." *Id.* at 635.

ARGUMENT

None of SRP's grounds for appeal fulfill any of the three requirements of Section 1292(b), let alone all three of them, as is required for certification.

I. None Of The Questions Are Questions Of Law, Let Alone Controlling Issues of Law.

"A question of law means a 'pure question of law,' not a mixed question of law and fact or an application of law to a particular set of facts." *Gonzales v. Schriro*, 2008 WL 2387330, at *1 (D. Ariz. June 10, 2008) (citing *Ahrenholz*, 219 F.3d at 675-77); *see also Allen v. Conagra Foods, Inc.*, 2013 WL 6000456, at *3 (N.D. Cal. Nov. 12, 2013). It must be "one that 'the court of appeals could decide quickly and cleanly without having to study the record.'" *Gonzales*, 2008 WL 2387330, at *1 (quoting *Ahrenholz*, 219 F.3d at 677). Each of SRP's posited questions involves mixed fact issues. In addition, two of them, A.R.S. § 12-820.01 and the filed-rate doctrine, involve issues that are not remotely controlling (even if they were pure legal issues, which they are not), because they relate only to damages claims, which are not presently at issue in this litigation.

A. State-action doctrine.

SRP argues that the "clear articulation" prong of the state-action doctrine is a

matter of law that must be resolved at the pleading stage. Mot. at 6. SRP is wrong. As the Court found, the "clear articulation" prong may not be appropriately resolved on the pleadings when, as here, SRP failed to identify any clear statement from the state that undermines the well-pleaded allegations. MTD Order, at 25.

The Supreme Court case SRP cites, *Hoover v. Ronwin*, 466 U.S. 558 (1984), illustrates the point. In *Hoover*, the district court dismissed a complaint with prejudice on state-action grounds and the Ninth Circuit reversed, holding that the complaint raised a fact issue. 466 U.S. at 566-67. The Supreme Court began by recognizing, "Closer analysis is required when the activity at issue is not directly that of a legislature or supreme court" because the legislature and supreme court are the "sovereign itself." *Id.* at 568-69, 574. However, the action in *Hoover* was the state supreme court's exercise of authority over lawyering. *Id.* at 570-71. That was an "incontrovertible fact" on which "the record [was] explicit." *Id.* at 581-82.

If SRP's position were correct, the Supreme Court's majority unnecessarily spilled ink in *Hoover*. There was no reason for it to counter the dissent's argument by pointing out that it had identified an "explicit" and "incontrovertible fact" that made the question resolvable by the Supreme Court after an appeal from final judgment. Nor need it have opened with a caution about "closer analysis" when the action is taken by an entity that is not a traditional sovereign. As SolarCity explains below and in its opposition to SRP's stay motion, even if a court were to find that SRP is a public entity for present purposes as a matter of fact or law, it would still not be a *sovereign* public actor.

B. Filed-rate doctrine.

SRP cites no case holding that the filed-rate doctrine is a matter of pure law. The Ninth Circuit has explained that "facts" have "guided" or "prompted" its decisions under the doctrine. *County of Stanislaus v. Pac. Gas and Elec. Co.*, 114 F.3d 858, 865-66 (9th Cir. 1997). The Circuit has elaborated that whether the filed-rate doctrine applies may turn on the "conduct" that is challenged. *Id.* at 866. None of those statements make sense if the filed-rate doctrine is necessarily a question of pure law.

Moreover, even if the filed-rate doctrine issue on which SRP appeals were a pure matter of law (which it is not), that issue could not be controlling in this case. The Supreme Court and Ninth Circuit have both made clear that the filed-rate doctrine is no bar to the antitrust relief SolarCity currently seeks – specifically, injunctive relief only – before final judgment. *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 418 n.22 (1986) (filed rate doctrine prevents recovery of damages based on tariff but "does not dispose of . . . relief by way of injunction" against repeating the antitrust violation underlying the tariff's competitive harm); *In re NOS Communications*, 495 F.3d 1052, 1060-61 (9th Cir. 2007) (filed-rate doctrine may prevent "damages," but other relief, including "injunctive relief" remains unaffected).[1] Nothing about SRP's appeal as to the filed-rate doctrine would control *anything* about the currently-pending litigation.

C. A.R.S. § 12-820.01.

Section 12-820.01 "immunity is related to a defendant's status," which means "usually there are limited factual determinations necessary to resolve the issue." *Link v. Pima County*, 193 Ariz. 336, 341 (Ct. App. 1998). It may even require resolution of related fact issues "by the jury as in qualified immunity cases." *Id.* The Court determined there were factual issues, consistent with the statute.

Moreover, as with the filed-rate doctrine, A.R.S. § 12-820.01 only affects claims for damages. *AlliedSignal, Inc. v. City of Phoenix*, 182 F.3d 692, 697 (9th Cir. 1999) (citing *Zeigler v. Kirschner*, 162 Ariz. 77, 84 (Ct. App. 1989)). Accordingly, even if SRP's appeal under the statute related to a pure question of law (which it does not), it does not relate to a *controlling* issue in the litigation.

II. There Is No Substantial Ground For A Difference Of Opinion.

The next requirement is a "substantial ground for difference of opinion," which courts determine by examining "to what extent the controlling law is unclear." *Couch*,

[1] SRP says that the Court would need to fix a rate to remedy the competitive harm. Mot. at 7-8. That is premature speculation, and it is false. A variety of injunctions can remedy competitive harms without fixing rates. For example, SRP could be prevented from discriminating against customers that use competitive technology or competing providers.

611 F.3d at 633. One "party's strong disagreement with the Court's ruling is not sufficient." *Id.* (quotation omitted). Nor is "the mere presence of a disputed issue that is a question of first impression." *Id.* at 634 (quoting *In re Flor*, 79 F.3d 281, 284 (2d Cir. 1996)). A "sufficient number of conflicting and contradictory opinions" may show substantial grounds for disagreement, though the opinions should "provide the factual context" to make "meaningful analysis and comparison possible." *Id.*

A. State-action doctrine.

The question SRP seeks to certify on state action is about the first requirement, clear articulation. Mot. at 3, 6. SRP does not argue that the Court should certify the second showing that SRP must make to use the state-action doctrine—that the active supervision prong either does not apply or is fulfilled if it does. *Id.*

Nearly all of SRP's "clear articulation" arguments to date have been based on the Arizona Electric Power Competition Act ("EPCA"). Ariz. Sess. Laws. Ch. 209 (1998), codified at A.R.S. §§ 30-801 *et seq.* & 40-202 *et seq.*, *et al.* As SolarCity pointed out in the motion to dismiss briefing, the Eleventh Circuit has performed a state-action analysis of a statute similar to, and of the same vintage, as 1998's EPCA. *Kay Elec. Coop. v. City of Newkirk*, 647 F.3d 1039, 1045-47 (10th Cir. 2011). The Eleventh Circuit's analysis demonstrates that SRP cannot succeed on clear articulation.

The defendants in *Kay Electric* were more than a business enterprise; they were "the City of Newkirk, Oklahoma" and its "Municipal Authority, a public trust." *Id.* at 1039. The statutory scheme was Oklahoma's 1997 "Electric Restructuring Act." *Id.* at 1045. The Act created a "task force" and framework to "provide greater competition" and "more efficient regulation" by opening traditional landline providers to a limited form of retail competition similar to EPCA. *Id.* Like EPCA, the regime was in disuse. *Id.* The Eleventh Circuit found in the Restructuring Act a policy to promote competition and consistency with the federal antitrust laws. *Id.*

In part, that came from *Kay Electric*'s recognition that a "clearly articulated and affirmatively expressed" policy to displace competition means what it says: "Put simply,

simple permission to play in a market doesn't foreseeably entail permission to roughhouse in that market unlawfully." *Id.* at 1044. The Supreme Court cited *Kay Electric* with approval—quoting those same words—on the state action doctrine two years later. *F.T.C v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003, 1013 (2013).

There is neither substantial ground to argue for a different outcome under EPCA nor any ambiguity in controlling law.

B. Filed-rate doctrine.

There is no substantial ground for a difference of opinion as to whether the filed-rate doctrine can apply in this case.

The Court held that this case does not come within the filed-rate doctrine because SolarCity has not challenged the reasonableness of a regulatory rate that it pays. MTD Order at 25. That is true for four reasons—any one of which would suffice, but none of which is subject to dispute.

First, the filed-rate doctrine only applies to suits by customers that are subject to the rate. *Cost Mgmt.*, 99 F.3d at 945-48. As the Court recognized, SolarCity alleges SRP "imposed the rates to exclude [SolarCity] from the market." MTD Order at 25. *Second*, the doctrine only applies when a tariff is filed with a regulator. *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 992 (9th Cir. 2000); *see also MCI Telecom. Corp. v. AT&T*, 512 U.S. 218, 234 (1994) (doctrine protects "regulated firms" under some circumstances). As the Court recognized, the filed-rate doctrine's predicate is a tariff filed with a "regulatory agency." MTD Order at 25 (citing *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 (1981)). *Third*, even if the SEPPs were a tariff (they are not), SRP filed them with no one but itself. *Fourth*, the SEPPs impose penalties so severe they are not meant to be paid at all, but are meant to prevent customers from defecting to SRP's solar competition, thereby excluding SolarCity.

As for whether the filed-rate doctrine applies under Arizona antitrust law, SRP cites two federal court decisions that it says "assumed" the doctrine applied to state laws,[2] and

[2] Actually, neither case assumed anything about Arizona substantive law. Both cases (footnote continued on next page)

language from a state case about whether a tariff was enforceable under the Arizona constitution (not a challenge that implicated the filed-rate doctrine or antitrust). Mot. at 8. In fact, the Arizona courts have done nothing but express skepticism about the filed-rate doctrine. *Qwest Corp. v. Kelly*, 204 Ariz. 25, 36 (App. 2002).[3] Nothing about controlling law, either federal or state, is unclear.

C. A.R.S. § 12-820.01.

There is no substantial ground for a difference of opinion under A.R.S. § 12-820.01. As elaborated in the concurrently filed opposition to SRP's motion to stay, SRP is not entitled to immunity—either under the common-law immunity the statute had revived or under the statute wrongly construed to expand that common-law immunity—for its electric functions, which are proprietary. O-MTS, Background III.B.

SRP says the Court's decision to defer a final determination on A.R.S. § 12-820.01 "conflicts" with state courts. Mot. at 6. But the state courts are clear that A.R.S. § 12-820.01 may present embedded factual issues, and that too is sufficient to reject SRP's argument. *Link*, 193 Ariz. at 341.

SRP analogizes to the regulatory proceedings of the Arizona Corporation Commission, "a separate, popularly-elected branch of state government" that exercises wide range of judicial and legislative powers, *Arizona Corporation Commission v. State ex rel. Woods*, 171 Ariz. 286, 290 (1992), as well as a California city and a Washington

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involved federal law: In *McLeodUSA*, the tariff was filed with the ACC pursuant to a ***federal*** statute. *McLeodUSA Telecomms. Servs., Inc. v. Arizona Corp. Comm'n*, 655 F. Supp. 2d 1003, 1018-19 (D. Ariz. 2009). In *Sun City*, the claims arose under ***federal*** law. *Sun City Taxpayers' Assoc. v. Citizens Utils. Co.*, 847 F. Supp. 281, 283 (D. Conn. 1994). Both courts therefore applied the federal filed-rate doctrine. *Knevelbaard*, 232 F.3d at 992 (discussing circumstances under which it is appropriate to apply the federal filed-rate doctrine rather than looking to substantive state law). Nor, contrary to SRP's representation, did *Sun City* hold that the "Arizona constitution codifies filed rate doctrine." Mot at 8. *Sun City* observed that the ACC was the type of powerful regulator to which the doctrine is meant to apply. 847 F. Supp. 2d at 289.

[3] The U.S. Supreme Court has suggested it has doubts about the doctrine, and the Ninth Circuit has likewise recognized its infirmities and declined to expand it. *Cost Mgmt.*, 99 F.3d at 944-47 (discussing *Square D. Co. v. Niagara Frontier Tariff Bureau*, 476 U.S. 409 (1986)); *see also Knevelbaard Dairies*, 232 F.3d 992 ("Although the doctrine has been questioned by many including the Supreme Court itself, it lives on to a limited extent"). There is no substantial ground to believe those considered opinions have reversed.

municipality, both of which were substate entities exercising a wide array of sovereign powers over the public that elects them. Mot. at 6-7. By contrast, SRP's retail electric operations are a "business enterprise" designed to promote private interests that control it, at the expense of the majority of electric customers who have no right to vote. *Ball v. James*, 451 U.S. 355, 358-59 (1981); *Niedner v. Salt River Project Agr. Imp. & Pwr. Dist.*, 121 Ariz. 331, 331 (1979); *Local 266, Int'l Bd. of Elec. Workers v. Salt River Project Agr. Imp. & Pwr. Dist.*, 78 Ariz. 30, 44 (1954). Under these circumstances there is no lack of clarity in controlling law.

III. Resolution Of None Of The Questions Would Materially Advance The Ultimate Litigation.

Section 1292(b) requires that that a certified legal question "could materially affect the outcome of litigation in the district court." *In re Cement Antitrust*, 673 F.2d at 1026. Even if SRP were right about the questions it posits, resolving those questions in SRP's favor would do nothing at all to change the scope of litigation or discovery.

A. State-action doctrine.

Again, the state-action question SRP identifies for certification concerns the doctrine's first requirement, "clear articulation." Mot. at 3, 6. This question would not materially advance anything because SRP must still make a factual showing on "active supervision."

SRP suggests in the Motion's introduction that "clear articulation" does not matter because state law denominates it as a "political subdivision." Mot. at 3. The Supreme Court earlier this year renounced any such standard. *N.C. State Board of Dental Examiners v. F.T.C.*, 135 S. Ct. 1101 (2015). If a "***nonsovereign***" state entity has features suggesting it will "further purely parochial public interests at the expense of more overriding state goals," then it must show it is supervised by a sovereign. *Id.* at 1112 (emphasis added). In this way, the state-action doctrine balances respect for the states' police powers against the federal interests of free and open competition from out-of-state competitors. *See id.* at 1112-14.

Sovereign entities have hallmarks, such as exercising a "wide range of governmental powers across different economic spheres, substantially reducing the risk" of pursuing "private interests while regulating any single field." *Id.* at 1113. By contrast, entities are likely to be nonsovereign and require active supervision when they are controlled by private interests that have a stake in the market. *Id.* at 1112-13.

The Supreme Court, the Ninth Circuit, and the Arizona Supreme Court have consistently explained why SRP is not sovereign: It has limited powers, and is fundamentally a "business enterprise." *Ball*, 451 U.S. at 358-59, 367-70; *Niedner*, 121 Ariz. at 331; *Local 266* at 44. In a case against SRP, the Ninth Circuit has concluded that Arizona "never intended to grant irrigation districts [such as SRP] governmental powers on a par with cities, counties, or the state itself." *Gorenc v. Salt River Project Agr. Imp. & Pwr. Dist.*, 869 F.2d 503, 507 (9th Cir. 1989). SRP is controlled by private interests that benefit from its conduct. SRP is electorally accountable only to a subset (one-third) of its electric customers. Am. Compl. ¶ 32. This subset benefits from the profits taken from the unrepresented two-thirds. *Local 266*, 78 Ariz. at 44 (1954).

Accordingly, SRP must show active supervision, which is "inappropriately resolved on a motion to dismiss." *Cost Mgmt.*, 99 F.3d at 942-43. There can be no difference of opinion; since the February 2015 *N.C. State Board* decision, SRP's arguments are outmoded.[4] Indeed, this is a much clearer case than *N.C. State Board* for

[4] *Cf. Sensational Smiles, LLC v. Mullen*, 793 F.3d 281, 287 (2d. Cir. 2015) (illegality exists "if—whether motivated by rent-seeking or by libertarian ideals—state action, though rational, violates the dormant Commerce Clause, or if a state licensing board that is insufficiently controlled by the state creates a monopoly in violation of the Sherman Act" (citing *N.C. State Board*)); *Rivera-Nazario v. Corporacion del Fondo del Seguro del Estado*, 2015 WL 5254417, *7 (D.P.R. Sept. 9, 2015) ("Up until recently, it was unclear whether formal state agencies and political subdivisions were subject to *Midcal's* "active state supervision" requirement."; "Earlier this year, however, the Supreme Court clarified that its holding in *Phoebe Putney*, was premised on the fact that the "need for supervision turns not on the formal designation given by States to regulators but on the risk that active market participants will pursue private interests in restraining trade"); *Patel v. Texas Dep't of Licensing and Regulation*, 469 S.W.3d 69, 107-08 (Tex. 2015) (Willett, Lehrmann, & Devine, J.J., concurring) (lauding *N.C. State* for recognizing that "state licensing boards prone to regulatory capture deserved no immunity for Sherman Act abuses," a welcome clarification because under prior law it was assumed such board "were sanctioned by the state" and need only meet the clear articulation test).

another factual reason: The N.C. State Board had a duty to "create, administer, and enforce" a licensing scheme and was granted "broad authority" to license the practice of dentistry—that is, regulatory powers over its competitors. 135 S. Ct. at 1104, 1107. SRP lacks the power to control SolarCity's business through a licensing regime.

For these reasons, the state-action question on which SRP seeks certification (clear articulation) cannot determine whether the state-action doctrine would apply and can have no effect on the pending litigation.

B. Filed-rate doctrine.

As noted above, the filed-rate doctrine applies only to claims for *damages*. Damages are not at issue in this case unless and until SolarCity has the opportunity for appeal the MTD Order's damages holding after final judgment. Accordingly, no filed-rate doctrine question could affect this Court's proceedings before final judgment.

C. A.R.S. § 12-820.01.

Similarly, A.R.S. § 12-820.01 only affects damages and therefore cannot affect the scope of litigation before final judgment. *AlliedSignal*, 182 F.3d at 697 (citing *Zeigler v. Kirschner*, 162 Ariz. 77, 84 (Ct. App. 1989)).

IV. There Is No Jurisdictional Issue.

SRP ends the Motion with a version of the jurisdictional argument from its motion to stay. Mot. at 9. If the MTD Order were properly appealable (which it is not), then the Court would not be able to alter the decision on the questions at issue in the MTD Order while the appeal was pending. O-MTS, Argument I.

The cases SRP cites in its Motion are consistent with those rules. Mot. at 9 (citing *Ret. Bd. of the Policeman's Annuity & Benefits Fund of Chi. v. Bank of N.Y. Mellon*, 775 F.3d 154, 159 n.4 (2d Cir. 2014) (after Court of Appeals took jurisdiction under 1292(b), no jurisdiction to perform an action that would require the district court "to reconsider its holding" on the issue appealed); *Karsjens v. Jesson*, 2015 WL 1893191 at *3 (D. Minn. Apr. 24, 2015) (indicative ruling where the Court's intended ruling would modify the appealed order to moot interlocutory appeal and divest Court of Appeals of jurisdiction)).

CONCLUSION

Nothing about the issues which SRP seeks to appeal warrants certification of this matter. Under the circumstances, SolarCity is entitled to litigate this case, obtain the relief that it and its consumers deserve, and get back to business. SRP must not be permitted to continue excluding competition for years as the case goes back and forth between this Court and the Court of Appeals.

The District's motion should be denied.

Dated: December 7, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 7, 2015, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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